



**Republic v Boke (Criminal Case E008 of 2023)
[2024] KEHC 4226 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE E008 OF 2023
RPV WENDOH, J
APRIL 25, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

PIUS MWITA BOKE ACCUSED

JUDGMENT

1. By the information dated 2nd March, 2023, Pius Mwita Boke was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the charge are that on the 16th of February, 2023 at Sakuri Village, Sakuri Location, Kuria East Sub-County in Migori County within the Republic of Kenya murdered Veronica Gati Mwita.
3. The accused denied the charge and the case proceeded to full trial with the prosecution calling a total of six (6) witnesses while the accused gave sworn evidence in his defence and did not call any witness.
4. The defence counsel in the matter is Ms. Otieno while the case was prosecuted by Mr. Kaino for the state.
5. PW1 Dr. Benard Otieno, performed the post-mortem on the deceased and filed his report dated 20/2/2023 (Pexh.1). He observed that there were no external injuries or markings; there was a displacement and fracture of cervical spine at C2 under the neck. It was his opinion that that the cause of death was trauma to the neck which had caused significant displacement of the cervical spine and fracture of C2. There were no samples taken from the body for further examination. Trauma could be by strangulation as she was a young girl and body muscles had not developed.
6. PW2 Mary Chacha Mosoga, a neighbour to the accused, was in her house on 16/2/2023 at about 10:00pm, when the accused's two children knocked her door. That she was trying to help them buy



- credit, when she heard someone asking for help on the road. PW2 went out and found the accused carrying the deceased. He told her that he did not know what had happened to the child. The child was not speaking, she did not observe the child. She then called a rider, one Daniel Mwita, who took them to Getende Hospital. The doctors took the child and later informed them that the child had died and took her body to the mortuary. The deceased's mother was also at Getende Hospital as she had just delivered. PW2 denied knowing the relationship between Mwita and the wife or the deceased.
7. PW3 James Chacha, aged 13 years, underwent a voire dire examination after which the court found that he was fit to give sworn evidence. He recalled that in February 2023, he was with his father, the accused, and younger mother called Mary Boke; that the deceased died on 16/2/2023 at about 9.00pm; that the accused asked him and his brother to go and get credit from Mary Chacha, who is a neighbour and gave him his phone. That he left his father, the accused, with Nyasengi and Veronica. While at Mary's place, he heard his father asking for help with the child. They went outside and his father was saying that Veronica had fainted, that she fell when she had gone for a call. PW2 called a rider and they took the deceased to the hospital. They later learned that Veronica had died. It was also his testimony that the deceased was not well and she looked sick. He stated that the deceased used to be given herbal medicine when she got sick and that she was a sickly child.
 8. PW4 Julius Boke the accused's father, stated that the accused was not Veronica's biological father. On 16/2/2023, he had visited the accused's home; that Veronica was at home though she looked sickly, had malaria. He later received a call informing him that Veronica had died.
 9. PW5 Mary Boke Mwita the deceased's mother and wife to the accused, stated that Veronica was her eldest child though the accused was not her biological father. On 16/2/2023, she was at Getende Hospital to deliver. She left the other children at home and on returning home the following day on 17/2/2023 at around 7.00am, she found people gathered at her home and she was informed that the accused had killed the deceased. She stated that when she left for the hospital Veronica was fine and had no illness. She further stated that the accused's relationship with Veronica was bad even though he lived with his other children well.
 10. In cross-examination, she maintained that the accused did not love the deceased and he used to beat her and if she questioned, he would beat her too.
 11. PW6 PC Thomas Oloo of DCI recalled that on 19/2/2023/22, he was assigned to investigate a murder case where Pius Mwita had been arrested by members of the public and detained at Kegonga police station. He witnessed the post-mortem of the child Veronica Gati at Wine Hospital mortuary. That it was the doctor's opinion that she died as a result of the trauma to the neck which caused a significant displacement of C2. It was his testimony that the accused assaulted the child because she was not his biological child. He did not see any injury or mark on the deceased.
 12. Accused gave sworn evidence and did not call any witness. It was his testimony that the deceased was his step-daughter, that on 16/2/2023, he took his wife to the hospital to deliver. After his wife had delivered, he went back home got home and James, his eldest son who was 12 years old told him that Veronica had health challenges and was sickly.
 13. He further stated that Veronica was epileptic since birth, that she had been taking traditional medicine, that he went to get medicine for the deceased when he saw the deceased fall down. He carried her to the road and asked for help, Mary his neighbour called a rider and they took the deceased to the hospital. On arrival at the hospital, Veronica was pronounced dead.
 14. The Accused faces a charge of murder contrary to section 203 of the Penal Code. The onus lies with the prosecution to prove their case beyond reasonable doubt. The legal burden of 'beyond reasonable



doubt' was aptly discussed in *Woolmington vs. DPP (1935)* A. C. 462 pp 481 where Viscount Sankey L.C. stated thus:-

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

15. An accused person is always presumed to be innocent till proved guilty. What amounts to reasonable doubt was discussed by Lord Denning in *Miller vs. Ministry of Pensions (1947)* 2 ALLER 372 where he stated:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.

16. The three ingredients that the prosecution must prove beyond reasonable doubt in a charge of murder are: -
1. Proof of death of the deceased;
 2. Proof that the accused caused the death by an unlawful act or omission;
 3. Proof that the accused possessed malice afterthought.

Proof of death

17. The deceased’s death is not in question. The Accused confirmed that they were informed of the deceased’s death on arrival at Getende Hospital. This fact was further confirmed by PW2, 3, 4 and 5 who testified in court and in particular PW1 who conducted the post-mortem on the deceased’s body in the presence of PW6. The post-mortem report was produced as Pexh. 1. PW1 made observations/ found that the cause of death was a possible trauma to the neck that caused significant displacement of cervical spine and fracture of C2. It therefore follows that the deceased did not die of natural cause.

Whether Accused caused the unlawful act:

18. It important to note that no one witnessed the murder. The prosecution is therefore relying on circumstantial evidence. There is no direct evidence pointing to the accused as the perpetrator of the offence. The question that therefore follows is whether such circumstantial evidence is sufficient to enable the court draw an inference that it was indeed the accused person who killed the deceased.



19. The Court of Appeal in the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction and stated as follows: -

Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr. App. No 32 of 1990*, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- ii. those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

20. It is the accused’s claim that the deceased died of natural causes. In his defence, he stated that the deceased was epileptic since birth and had been taking traditional medicine. He raised the issue of epilepsy for the first time in his defence. No question of epilepsy was put to the deceased’s mother PW5. PW3 and 4 alleged that the deceased was sickly or had malaria, a narrative that PW5 dismissed.
21. PW1 observed that the cause of death was possible trauma to the neck that caused significant displacement of the cervical spine and fracture of C2. This trauma he observed, may have been caused by strangulation. Further, he opined that since the deceased was a young girl and her body muscles had not fully developed, no much force was needed in strangling her hence the lack of external physical marks.
22. It is important to note that even though the accused averred that the deceased was epileptic since birth, he did not produce any evidence in the form of a medical report or treatment notes to prove the said averments. It is his contention that the deceased was usually given traditional medicine, again, there was no proof of the same. PW3, the accused’s son also testified that the deceased looked unwell on the fateful. PW4 in his part stated that when he went to the accused’s home to check on them, he found the deceased unwell from malaria. These three accounts are different and contradictory. Despite stating that he saw the deceased falling down, he did not give any description to give a deduction that the trauma could have resulted from the fall. PW3 told the court that the accused told him that deceased fell when she went outside for a call. This is a different narrative from Accused’s. While it is common that persons suffering from epilepsy may get a sudden attack and fall down, it is not common that every fall from a bout of epileptic episode would necessarily result on a trauma of the neck and possible death.
23. The law is clear that the burden of proof in criminal cases rests on the prosecution to prove its case beyond reasonable doubt. No duty is imposed on the Accused to prove his innocence but there are instances when the law places a duty on the accused to explain certain facts particularly those peculiarly



within his knowledge. Section 111 (1) of the Evidence Act which casts the burden of prove on Accused provides:-

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

24. Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
25. Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.
26. Section 119 of the Evidence Act provides for the presumption of likely fact and states as follows: -

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”
27. From the above sections, duty is placed on the accused to explain the existence of the circumstances he alleged, which were only within his knowledge on how the deceased met her death. How did she fall? Did she fall from a height as to fracture her spine? and caused her death. This presumption was not discharged by the accused by giving a plausible explanation in cross-examination or otherwise. His allegation that the deceased fell is hollow.

Of malice aforethought

28. Malice aforethought is defined in Section 206 of the Penal Code as: -
 - (a) an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted or not
 - (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually netted or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.
 - (c) An intent to commit a felony
 - (d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony”.
29. In the case of Tubere s/o Ochen vs. Republic (1945) EALR 63 the court explained when malice aforethought exist when it said; -

In determining existence or non-existence of malice, one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”
30. In the present case a presumption is drawn from the facts and evidence presented by the prosecution that the accused committed the offence. Accused’s explanation on how the deceased met her death is not plausible. How did the deceased fall, such that she could fracture her spine at the neck? PW5 confirmed that when she left to go to the hospital, the deceased was in good health. Further, she



demonstrated the hostility and the relationship between the accused and the deceased and how he used to beat the deceased and when she questioned, she would be beaten too. Further, I have taken note of PW1's observation and explanation for the lack of external injuries and marks of strangulation. The deceased was a child of barely 5 years and her body muscles had not fully developed, no much force was needed to strangle her.

31. From the foregoing, it is the finding of this court that the circumstances taken cumulatively form such a chain so complete that there is no escape from the conclusion that the accused committed the offence. See test in Court of Appeal case of Abang'a (Supra). In the end, I find that accused, with malice aforethought, attacked and injured the deceased, causing her death.
32. In view of the foregoing, I find the Accused guilty of the offence of murder contrary to Section 203 of Penal Code and convict him accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of April, 2024.

R. WENDOH

JUDGE

In presence of; -

Ms. Ikol for the state

Ms. Otieno for Accused present

Accused Present

Ms. Emma –Court Assistant

